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Jo Shaw

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The Political Representation of Europe's Citizens: Developments

Court of Justice of the European Communities

Decisions of 12 September 2006, Case C-145/04, *Spain v. United Kingdom*, and Case C-300/04, *Eman and Sevinger v. College van Burgemeester en Wethouders van Den Haag*

Jo Shaw*

INTRODUCTION: THE POLITICAL REPRESENTATION OF EUROPEAN CITIZENS

What is a 'European' Parliament and who should vote for it? Should it be the 'citizens' of the European Union alone? If so, should it be all EU citizens, or only those who are resident in the member states? Or should the electorate include potentially all *residents* in the member states which comprise the EU and who are thus affected by decisions taken in the Parliament? Does anyone have a 'right' to vote for the European Parliament? And who should decide who votes for the European Parliament – the member states, or the EU itself? In other words, is there a single European concept of the European Parliamentary *demos*, or twenty-seven separate, but overlapping, national concepts?

Moreover, since EU law, under Article 19(2) EC, now requires all member states to accord to nationals of the other member states resident in their territory the right to vote for the European Parliament on the same basis as nationals (i.e., a non-discrimination right), does this create an exhaustive framework for a 'European' definition of the European Parliamentary *demos*, or merely a facilitative framework within which member states may add to, but not take away from, the basic rights laid down in the Treaty and the subsequent directive? If the member states

* Salvesen Chair of European Institutions, University of Edinburgh. Material in this note draws upon and builds upon several of the chapters in my book *The Transformation of Citizenship in the European Union* (Cambridge, Cambridge University Press 2007), notably Chapters 4 and 6. I am grateful to Cambridge University Press for permission to reprint material. Chapter 4 of that book in turn draws upon A. Connolly, S. Day and J. Shaw, 'Alien Suffrage in the European Union: Contested and Incomplete?', in R. Bellamy, D. Castiglione and J. Shaw (eds.), *Making European Citizens* (Basingstoke, Palgrave 2006).

may add to the categories of voters for the European Parliament, such as by allowing voting by resident third country nationals, are they subject in that context to any constraints under EU law? In a similar vein, what is the territorial scope of the European Parliamentary *demos*? To what extent is it circumscribed by the outer geographical boundaries of the EU, as set by Article 299 EC, or can those covered by the personal scope of Union citizenship also quite properly vote for the European Parliament when they are resident in a third state, or in some associated territory which is not fully part of the EU? If so, is that a matter for decision by the EU institutions under the Treaties or for the member states, and – if the latter – is their discretion on external voting¹ entirely unfettered, or subject to general principles of EU law?

The Act on Direct Elections, originally adopted in 1976 and subsequently amended on a number of occasions,² lays down some limited ‘uniform’ aspects of elections to the European Parliament, with other matters left at the present time to the member states. In 2006, the nature of European Parliamentary voting rights came under scrutiny in two cases which came before the Court of Justice, both of which arose in the context of deep-rooted political contestation *within* and *between* the member states. However, these cases articulate important messages about the nature of political representation in the EU, and also – indirectly – about the nature of European citizenship as a political, as well as socio-economic, concept. To put these cases and the issues they raise in context, it is important to set out in some detail the background to the evolution of political representation in the EU.

THE HISTORY OF POLITICAL REPRESENTATION IN THE EU

The struggle to ensure effective political representation of European citizens in the context of European integration has a very long history. While the roots of a political and (especially) legal discourse of European citizenship can be traced back to the late 1960s when Commission Vice President Levi Sandri referred to the development of a body of rules relating to the free movement of workers as ‘an incipient form – still embryonic and imperfect – of European citizenship’,³ debates in the European Parliament around universal suffrage as the basis for direct elections go back even further, to the inception of the Assembly itself. The history

¹ For an extended discussion of external voting see R. Bauböck, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’, *Fordham Law Review* (2007), p. 2393.

² For the latest version of the Act on Direct Elections, see Council Decision amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom, *OJ* [2002] L 283/1.

³ See Bull. EC 11/68, at 5-6.

of electoral rights in the EU has thus always been linked not only to the debate about the emergence of a concept of European citizenship which builds upon the longstanding free movement rights, but also to a predominantly inter-institutional discourse about democratization of the European institutions, notably the European Parliament.

According to Article 21(1) of the ECSC Treaty dating back to 1951:

The Assembly shall consist of delegates whom the Parliaments of each of the member states shall be called upon to appoint once a year from among their own membership, or who shall be elected by direct universal suffrage, according to the procedure determined by each respective High Contracting Party.

This reference to 'direct universal suffrage' marked the start of the Parliament's debate on voting rights. From 1960 onwards, the idea of direct elections to the Parliament animated the Parliament as it focused on, and used arguments about, 'building Europe'⁴ and establishing democratic structures to support this aim.⁵ In 1960, the Parliament adopted a proposal for a uniform electoral procedure for direct elections to the European Parliament, including the proposal that elections by direct universal suffrage would include the right of nationals of the member states to vote in member states other than their own,⁶ but it dropped this controversial suggestion in the next version of its proposal on the uniform electoral procedure, which was a more minimal text adopted in 1975 with a view to facilitating as quickly as possible the initiation of direct elections which were eventually held in 1979.⁷ However, the notion reappeared again in the 1982 proposal, but that was once again not adopted by the Council.⁸ The basis for the Parliament's work in this area lay in what was then Article 138(3) EEC (now Article 190 EC as amended), which mandated the Parliament to propose, for unanimous adoption by the Council of Ministers, proposals for the election of the Parliament by direct universal suffrage.

Although the Parliament received support from certain quarters for direct elections,⁹ it encountered opposition in other places. A principal reason for this was

⁴ Ninth General Report on the Activities of the Community, 1 Feb. 1960 to 31 Jan. 1961.

⁵ 'The European Parliament demands that the application of the principles of a constitutional theory based on democracy and the primacy of the law should be reinforced in order to ensure the future development of the Community', see 4 *Bulletin de la Communauté Européenne du Charbon et de l'Acier*, Chronologie Années 1950-1960, Luxembourg 1967, at 68.

⁶ The proposal is to be found in a Resolution dated 17 May 1960, *Journal Officiel* 1960, 834, Art. 7.

⁷ A. Evans, 'European Citizenship: A Novel Concept in EEC Law', *American Journal of Comparative Law* (1984), p. 679 at 705.

⁸ *OJ* [1982] C 87/61.

⁹ The Italian government introduced measures concerning the direct election of Italian members of the European parliament, and in 1968 Christian Democrat MEPs asked the Italian govern-

the belief that under the founding Treaties the Parliament did not have sufficient powers to justify it being directly elected. By contrast parliamentarians themselves tended to think it would be undemocratic for the powers of the Parliament to be augmented *without* it first being directly elected. This conflict reached a pinnacle with the Commission's 1972 report on *The Enlargement of the Powers of the European Parliament*.¹⁰ Whilst the Parliament inclined towards the view that it should be directly elected and that subsequently as the most democratic body in the Community it should have stronger powers, the report concluded that the powers of the Parliament should be increased first. It found that 'The new powers would, of their very nature, constitute means of influencing events in such a way as to promote the application of Article 138 of the EEC Treaty.'¹¹

The governments of Belgium and Italy were the first to consider the direct election of their own members of the European Parliament, and bills to provide for such direct elections were brought before their parliaments. Moreover, Article 4 of the proposed law for direct elections put before the Belgian parliament provided that 'nationals of the member states of the European Communities who have their residence in Belgium may take part in the elections to the European Parliament under the same conditions as Belgian citizens.'¹² This helped to launch the idea of extending the *boundaries* of the suffrage in European elections at the same time as instituting *direct* elections. The Parliament took up Belgium's position with regard to the universal right to vote in European elections and was sympathetic to the right to vote in elections in the place of residence.¹³ On the other hand, the Commission did not refer to the right to vote and stand in European elections as one of the 'special' rights connected with (European) citizenship in a 1975 report¹⁴ and this was undoubtedly because the question of direct elections to the Parliament remained at that time contested and the project incomplete.

When the first direct elections to the Parliament did eventually take place in 1979, after the adoption of the Council Act on Direct Elections,¹⁵ nationals of

ment to invite other European governments to begin the direct election of their members; see *Cahiers de documentation européenne*, oct.-déc. 1968, Parlement Européen, p. 69; the Luxembourg Socialist Party made it a standing stipulation that there should be direct elections to the EP and in 1969, it called on the government to table a bill to this effect. European documentation – a survey, April-June 1969, European Parliament, p. 67.

¹⁰ Vedel Report, Bull. EC Supp. 4/72.

¹¹ Vedel Report at p. 60.

¹² Patijn Report, EP Working Doc. 368/74, 13 Jan. 1975, p. 43.

¹³ See Art. 7 of the Parliament's draft Convention on direct universal elections.

¹⁴ See Bull. EC Supp. 7/75, esp. point 2.2.2.

¹⁵ Council Decision 76/787/ECSC, EEC, Euratom relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ [1976] L 278/1.

the member states resident in another member state were not able to vote, unless this had been provided for at national level.¹⁶ The only provision at European level on this matter was a prohibition on double voting,¹⁷ which was largely aimed at those with dual nationality, as they are the group historically most likely to double vote. This was just one of the several respects in which the vocation of Article 138(3) EEC to see the adoption of a uniform electoral procedure as the basis for the elections based on direct universal suffrage was sacrificed on the altar of political expediency, in order to secure agreement amongst the nine member states, some of whom feared interferences in their national sovereignty as one of the consequences of direct elections.¹⁸ For example, the United Kingdom feared that it might be forced to introduce a form of proportional representation as its electoral system.¹⁹ However, in the meantime what is now Article 190 EC has been amended to provide that 'the representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage', thus constitutionalising direct elections. Moreover, the European Parliament continues to be mandated to draw up proposals for a uniform procedure for direct elections, under Article 190(4) EC, but in practice the elements of that uniform procedure remain incomplete and do not affect any issues of suffrage definition at the national level.

Soon after the first direct elections, the Parliament settled down once again to examine the criteria for extending the right to vote as an entitlement under EU law. The Seitlinger report²⁰ suggested that member states ought to give the right to vote in European elections to those nationals of other member states who had been resident in that state for five years or more, whereas nationals of member states who had not resided in the host member state for five years should be given the right to vote *by* their home state *in* their home state (i.e., external voting, but in the country of origin). The right to stand for election was to be guaranteed in the member state of nationality alone. The report justified the right to vote in the member state of residence by the principle of long-term residence. However, the

¹⁶ S. O'Leary, *The Evolving Concept of Community Citizenship* (The Hague, Kluwer 1996) p. 207.

¹⁷ Art. 8; this is also laid down in Art. 4 of Directive 93/109 *supra* n. 29.

¹⁸ G. van den Berghe, 'Direct Elections in Accordance with a Uniform Procedure', *European Law Review* (1979), p. 331.

¹⁹ Except in Northern Ireland, where it introduced PR based on a single transferable vote from the very beginning, the UK maintained a first past the post constituency system until the 1999 European Elections, when it introduced the d'Hondt system for multi-member constituencies under the European Parliament Elections Act 1999: D. Farrell and R. Scully, 'Electing the European Parliament: How Uniform are "Uniform" Electoral Systems?', *Journal of Common Market Studies* (2005), p. 969.

²⁰ Seitlinger Report, draft text on the electoral procedure, A1-988/81, 26 Feb. 1982.

Parliament in plenary took a different approach. It maintained that the right to vote should be a right conferred by the member state of nationality alone.²¹ On the other hand, however, the Parliament did propose that the right to stand for election should be given by the country of residence after five years; this would have meant that an individual could stand in an election and in a country where he or she could not actually vote.²² The Council did consider the Seitlinger report and the Draft Act several times within the Committee of Permanent Representatives (COREPER) but no further action was taken.²³ Overall, the voting rights debate was a victim of an advanced level of stagnation in the European Community at the time, a stagnation which also ensnared the parallel debate about 'special rights' for European citizens.

Following the second set of European elections in 1984, and with the aim of reviving the debate within the Council, the Parliament started work on a new proposal on the electoral procedure.²⁴ In an opinion, the Political Affairs Committee had made a clear proposal on external voting in European elections, stating that

Nationals of a Member State shall be entitled to vote in the country of which they are nationals. The Member States shall take all the necessary measures to enable their nationals whose place of residence is outside their country of origin to exercise their electoral rights without hindrance in the Member State of which they are nationals.²⁵

Meanwhile, the Adonnino Committee, set up in 1984 after the Fontainebleau European Council, comprising personal representatives of the heads of state and government and their foreign ministers and tasked with developing concrete suggestions to implement a People's Europe and thereby to enhance 'European identity', argued in its first report to the European Council that

It is *desirable* to increase the citizen's involvement in and understanding of the political process in the Community institutions [and that] the electoral procedure ...

²¹ See Art. 5 of the Parliament's Draft Act on a uniform electoral procedure, adopted by Resolution on 10 March 1982, *OJ* [1982] C 87/61. If the national has left the territory of the member state this, of course, raises the question of expatriate voting, and the degree of connection which expatriates should have before voting. Clearly to institute such an electoral rule by means of the uniform electoral procedure would have been as substantial an interference in national sovereignty as the institution of electoral rights for non-nationals.

²² Art. 6 of the Draft Act.

²³ See the further Resolution of the European Parliament of 9 March 1983, deploring the lack of action on the part of the Council of Ministers before the 1984 elections, *OJ* [1983] C 96/28.

²⁴ Bocklet report, EP Working Doc., A2-1/85.

²⁵ *Supra* n. 24, Art. 2(i).

shall ensure either that a citizen should be entitled to vote for candidates from his own country ..., or that a citizen residing in another Member State should be allowed to vote for candidates from that Member State (emphasis added).²⁶

The report recommended that discussion of the matter should continue, but at the same time made it categorically clear that the subject remained within the competence of the member states to decide, a view regularly endorsed by the Council.²⁷

Notwithstanding these extensive discussions, the first concrete legal developments regarding the nature and scope of the right to vote of nationals of the member states in European Parliament elections came not with changes to the arrangements for direct elections, but with the Treaty of Maastricht and the institution of citizenship of the Union through Article 17 EC et seq. In terms of political rights, EU citizenship saw the introduction of limited equal treatment rights for nationals of the member states in local and European Parliamentary elections in Article 19 EC. Thus, as is well-known, Article 19(2) EC provides:

Without prejudice to Article 190(4) and to provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogation where warranted by problems specific to a Member State.²⁸

Article 19(2) was implemented through a directive adopted in 1993,²⁹ which specifically addresses the issue of the equal treatment rights of EU citizens resident in 'the Member State of residence' (Article 3). Article 1(2) preserves the powers of member states in relation to the regulation of external or expatriate voting, providing that 'nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory.' Since that date, the Article 19(2) rights have been applied in three European Parliament elections (1994, 1999 and 2004), and on

²⁶ Bull. EC Supp. 7/85 – *A People's Europe*; see also the Commission's response in Bull. EC Supp. 2/88.

²⁷ O'Leary, *supra* n. 16, at p. 236.

²⁸ Art. 19(1) EC sets out a similarly worded equal treatment guarantee in relation to the right to vote and stand in local elections for EU citizens resident in another member state.

²⁹ Directive 93/109/EC, OJ [1993] L 329/34. Art. 19(1) is implemented through Directive 94/80/EC, OJ [1994] L 368/38.

each occasion the Commission has issued a report on the experience, which has concentrated on the effectiveness of the modalities for ensuring that the right to vote in the *host* member state has been protected under EU law. It has not focused its attention on the nature of the 'right to vote' in European Parliamentary elections, as such.

Against this background we can now consider the issues raised in the *Gibraltar* and *Aruba* cases, which do – finally – shed some light upon the nature of that 'right to vote'.

THE GIBRALTAR AND ARUBA CASES

The *Gibraltar* case³⁰ dealt with the question whether Commonwealth citizens resident in Gibraltar should be able to vote in European Parliament elections, given that they were enfranchised under a parallel extension of UK's standard suffrage rules which give Commonwealth citizens who are legally resident the right to vote and stand in all elections in the United Kingdom.³¹ This situation arose after the United Kingdom included Gibraltar in its electoral territory as a result of a case brought before the European Court of Human Rights in the 1990s regarding the right to vote in European Parliament elections by UK citizens in Gibraltar, and the status of the European Parliament as a legislature *vis-à-vis* Gibraltar. The case was brought by Spain under Article 227 EC, which argued that the right to vote in European Parliament elections must be confined to EU citizens. The *Aruba* case³² came before the Court of Justice by way of a reference for a preliminary ruling under Article 234 EC from the Dutch *Raad van State*, in a case brought by two Netherlands nationals resident in Aruba, who objected to a decision of the municipal authorities of The Hague refusing to place their names on the electoral register for European Parliament elections in the Netherlands.

The two cases were not joined, as such, but a single Opinion was delivered in April 2006 by Advocate-General Tizzano, and the two judgments were delivered on the same day in September 2006 and share many elements in common. For the purposes of this presentation, it is useful to begin by setting out in more detail the background to the *Gibraltar* case, before moving on to consider the situation which arose in *Aruba*. Thereafter, the findings of the Advocate-General and the Court of Justice will be examined, and the implications of these findings drawn out.

³⁰ Case C-145/04 *Spain v. United Kingdom*, 12 Sept. 2006.

³¹ For details of the UK franchise, see House of Commons Library, Standard Note, *Electoral Franchise: Who can Vote?*, SN/PC/2208, 1 March 2005.

³² Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag*, 12 Sept. 2006.

The Gibraltar case

Annex II of the 1976 Act on Direct Elections provides that 'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.'³³ This excluded a territory such as Gibraltar. Denise Matthews, a resident of Gibraltar, complained that she was not permitted to register as a voter for the European Parliament elections of 1994, even though she is a UK citizen and thus an EU citizen. This, she alleged, was a breach of Article 3 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which obliges states to hold free and fair elections ensuring the free expression of the people in the choice of the legislature.

Gibraltar has been a dependent territory and Crown Colony of the United Kingdom since the early 18th century, when it was ceded to the British Crown by the King of Spain under the Treaty of Utrecht. Gibraltar's situation with regard to the EU is rather anomalous. It is not part of the United Kingdom, as a Crown Colony, but it is part of the European Union by virtue of Article 299(4) EC, as a European territory for whose external relations a member state is responsible. However, it is not part of the customs territory and is treated as a third country for the purposes of the common commercial policy. On the other hand, many EU legislative acts in the areas such as the free movement of persons, services and capital and the protection of the environment and consumers do apply to Gibraltar and become part of the legal order of Gibraltar in the same way as they do in relation to the member states. Since the Act on Direct Elections did not appear to be reviewable before the Court of Justice as an act of the member states, Matthews turned to the ECHR in order to seek a remedy. By virtue of a declaration made in 1953 by the United Kingdom, the ECHR is applicable to Gibraltar.

In a judgment of 18 February 1999,³⁴ the Court of Human Rights found that the United Kingdom was in principle responsible for any violation even though the infringement originated in the Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage. The fact that the EU electoral machinery is decided at EU level and not at national level does not in principle absolve a state of responsibility under the ECHR. Furthermore Article 3 could be applied to elections to the European Parliament even though this was not envisaged when the ECHR was originally drafted. The European Parliament should now be viewed as at least part of the 'legislature' of the EU, this being an essential precondition for applying Article 3. Especially since the Treaty of Maastricht, the Parliament has played an important role within the EU's legislative process, for many if not all legislative acts, and its role in general can be

³³ See *supra* n. 15.

³⁴ ECtHR 18 February 1999, Case No. 24833/94, *Matthews v. United Kingdom*.

connected to the task of ensuring an effective political democracy in the EU. Finally, the United Kingdom could not invoke its 'margin of appreciation' in deciding that in order to apply its European Parliamentary electoral system it had to exclude Gibraltar, just because its population was too small to be a full European Parliament constituency (at the time there was single constituency, first-past-the-post voting in the UK for European Parliament elections).

The UK's initial reaction was to seek an amendment to Annex II of the 1976 Act of Direct Elections in order to include Gibraltar, but this avenue (which would require unanimity amongst the member states) was blocked by Spain on the basis of its sovereignty dispute with the United Kingdom. As a result the United Kingdom caused the following statement to be included in the minutes of a meeting of the Council of Ministers on 18 February 2002:³⁵

Recalling Article 6(2) of the Treaty on European Union, which states that 'Union shall respect the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law', the United Kingdom will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing United Kingdom constituency, in order to ensure the fulfillment of the United Kingdom's obligations to implement the judgment of the European Court of Human Rights in [*Matthews*], consistent with European law.

Accordingly, in 2003, the United Kingdom adopted legislation enabling elections for the European Parliament to take place in Gibraltar from 2004 onwards in the form of the European Parliament Representation Act 2003, and it incorporated the voters of Gibraltar into the South West of England multi-member constituency for the June 2004 elections, on advice from the Electoral Commission.³⁶ In addition to any EU citizens entitled to vote under Article 19(2) EC, in line with the general position on the suffrage in the United Kingdom, certain qualified Commonwealth citizens resident in Gibraltar were entitled to register and vote. This admittedly small group of Commonwealth citizens (around 100-200 persons, most of whom are from South Asia) would inevitably be third-country nationals and not EU citizens, unless they were Maltese or Cypriot and thus entitled to vote as EU citizens.

³⁵ This procedure is detailed in AG Tizzano's Opinion, 6 April 2006, paras. 32-34.

³⁶ 'Gibraltar should join South West for elections to European Parliament,' 28 Aug. 2003, <www.gibnet.com/eurovote/ec_aug.htm>.

Spain has long contested the UK's claim to sovereignty over Gibraltar, especially during the Franco era when the land border was closed.³⁷ Since Spain became a member of what were then the European Communities in 1986, some of the disputes between Spain and the United Kingdom over Gibraltar have been filtered through the prism of the application of EU law in Gibraltar. In this instance, the extension of votes to Commonwealth citizens became the focal point of Spain's objections.³⁸ Spain filed a complaint with the European Commission in July 2003, stating that the UK measures violated EU law, in particular Articles 17, 19, 189 and 190 EC, and Annex II of the Act on Direct Elections, because the franchise to vote in European Parliament elections as determined under the UK legislation was not confined to persons who are EU citizens. In October 2003, the Commission held an oral hearing involving Spain and the United Kingdom, and concluded that there was no violation by the United Kingdom. In the absence of specific rules in the franchise in the EU measures which provide for direct elections, the Commission concluded that there was 'no general principle of Community law according to which the electorate in European Parliament elections cannot be extended beyond EU citizens.'³⁹ Arguing – as indeed is obvious after the *Matthews* case – that Annex II of the 1976 Act on Direct Elections must be interpreted in the light of the ECHR, the Commission furthermore concluded that this was a provision which was sufficiently open to allow the United Kingdom to assimilate Gibraltar to the electoral territory of England and Wales in order to comply with its obligations under the ECHR. It suggested that Spain and the United Kingdom find a friendly resolution to their dispute without recourse to law, and declined the Spanish request that it adopt a reasoned opinion stating violations of EU law on the part of the United Kingdom. Since the Commission refused to take action under Article 226 EC, Spain decided to take the unusual step of starting an enforcement action itself in the Court of Justice, under Article 227 EC, without the support of the Commission.

The Aruba case

The *Aruba* case raised the right to vote in European Parliament elections of citizens of the Kingdom of the Netherlands who are resident in the island territory of

³⁷ See N. Ho, 'A Rocky Road: The Political Fate of Gibraltar', *Harvard International Review*, Winter 2004 <<http://hir.harvard.edu/articles/1177/>>; 'The Issues Explained: Gibraltar', 4 Aug. 2004 <<http://www.guardian.co.uk/theissues/article/0,,602017,00.html>>.

³⁸ 'Spain says Gibraltar vote illegal', BBC News, 5 July 2005 <http://news.bbc.co.uk/1/hi/uk_politics/4651815.stm>; 'Fears over Commonwealth EU voters', BBC News, 6 April 2006 <http://news.bbc.co.uk/1/hi/uk_politics/4882790.stm>. See for more details, House of Commons Library Research Paper, *Gibraltar: Diplomatic and Constitutional Developments*, 06/48, 11 Oct. 2006, esp. p. 36-43.

³⁹ 'Right to vote in EP elections in Gibraltar', IP/03/1479, 29 Oct. 2003.

Aruba, which is just off the coast of Venezuela. Aruba is part of the Kingdom of the Netherlands, but is a self-governing overseas territory (OCT) and as such is not part of the EU under Article 299 EC.⁴⁰ As an OCT, only very limited aspects of EU law apply to Aruba, either directly or indirectly by virtue of Dutch law, or in some cases voluntarily because the Aruban legislature has chosen to align itself with EU law.⁴¹ The Euratom Treaty does apply there, as, arguably, does the Part VI of the Treaty on EU (third pillar on police and judicial co-operation in criminal matters) which has no territorial scope but merely binds the governments of the member states. As citizens of the Kingdom of the Netherlands benefiting from a single national citizenship for the Kingdom (which extends also to the Dutch Antilles) but with permanent residence in Aruba, the applicants Eman and Sevinger argued that they were citizens of the Union. However, so long as they were resident in Aruba under Dutch law they are denied the right to vote in European Parliament elections. They could vote if they moved to reside in the Netherlands itself, or if they moved to live in a third country. In the latter case, their rights would be based on the general Dutch external voting arrangements which make no distinction in respect of Netherlands nationals who are resident in third countries as to whether they have previously been resident in the Netherlands itself, or in Aruba or the other non-European territory of the Netherlands, the Netherlands Antilles. In accordance with Article 1(2) of Directive 93/109, which preserves the discretion of the member states in relation to external voting rights, the Netherlands is one state which does grant voting rights to its citizens when they reside in third countries, with the justification that this preserves the link between the expatriated citizen and the home state.

THE CONCLUSIONS OF THE ADVOCATE-GENERAL AND THE FINDINGS OF THE COURT OF JUSTICE

The Advocate-General's advice to the Court of Justice was that:

- it should declare, in the *Gibraltar* case, that the United Kingdom has failed to fulfil its obligations under the EC Treaty, and in particular the Decision

⁴⁰ For political background on Aruba, see M. Sharpe, 'Globalization and Migration: Post-Colonial Dutch Antillean and Aruban Immigrant Political Incorporation in the Netherlands', *Dialectical Anthropology* (2005), p. 291. Further evidence of discontent in relation to political representation issues in Aruba can be derived from the fact that the same applicants, who are prominent members of an Aruban political party, the AVP, brought an action before the European Court of Human Rights against a refusal on the part of the Netherlands authorities to register them as voters for the Netherlands national assembly. The action was declared inadmissible as manifestly unfounded by the Court on 6 Sept. 2007 (*Eman and Sevinger v. Netherlands*, Appl. Nos. 17173/07 and 17180/07). I am grateful to Leonard Besselink for drawing my attention to these cases.

⁴¹ Opinion of the Advocate-General, para. 159.

relating to the Act on Direct Elections, by allowing Commonwealth citizens resident in Gibraltar to vote in European Parliament elections, and that

- it should rule, in the *Aruba* case, that it is contrary to EU law for a member state to withhold (without objective justification) the right to vote in European Parliament elections from citizens residing in another part of the state other than the European territory, when it grants that right to vote to citizens when they are resident in the European territory and when they are resident in a non-member state. This would leave it open to the member state to provide such an objective justification, but in this case the Netherlands had failed to satisfy that requirement.

The Court of Justice differed slightly in its approach to the two cases from the AG. In the first place, its judgment does not contain an extended discussion of the citizenship and constitutional issues which are raised by the cases. To that extent, it is hard to say with certainty whether it might approve of some of the more general statements made by the AG which will be discussed below. Furthermore, while adopting essentially the same ruling as proposed by the AG in the *Aruba* case on the rights of the Arubans, it found in favour of the United Kingdom in the *Gibraltar* case, concluding that in the arrangements that it made it had not exceeded its discretion under EU law as it stands. The discussion which follows presents first the broader approach presented by the AG, and then highlights the narrower solutions offered by the Court of Justice. Of course the former's approach is not the definitive statement of the law as it stands, but is merely an advisory Opinion, but it is interesting to study this Opinion because it may provide some pointers as to how EU law in this field might develop in the future.

The AG's Opinion offers the first extended consideration by a judicial authority in the EU of the political rights of Union citizens, insofar as it discusses the nature of European citizenship as a political status. The AG began his discussion with a general meditation on whether a right to vote in European Parliament elections is one of the EU citizenship rights guaranteed under the EC Treaty. Such a reflection was not strictly essential for the task of deciding the case (as the omission of any such discussion from the Court's judgment clearly shows), but it provides vital background for understanding the underlying position on the nature of EU citizenship which the AG chose to take, as his argument focuses on the legitimate extensions and restrictions which member states may grant or impose, taking as a baseline a premise that the right to vote in European Parliament elections is indeed an incident of citizenship of the Union.

The AG's first finding was that

it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.⁴²

He reached that conclusion even though no provision of EU law explicitly includes the right to vote for the European Parliament amongst the list of rights inherent in citizenship of the Union, although Article 19(2) 'in any event takes it for granted that the right ... is available to citizens of the Union.'⁴³ He argues that the right is based on

the principles of democracy on which the Union is based,⁴⁴ and in particular, to use the words of the [European Court of Human Rights] the principle of universal suffrage, which 'has become the basic principle' in modern democratic states.⁴⁵

In the arena of EU law, this finding can also be derived from the references to universal suffrage in Articles 189 and 190 EC, and Article 1 of the 1976 Act on direct elections, which militate 'in favour of recognition of a right to vote attaching to the largest possible number of people.'⁴⁶ The AG finally supported the argument by reference to Article 3 of the Protocol No. 1 of the ECHR, which was the foundation for the *Matthews* judgment, protecting 'the free expression of the opinion of the people in the choice of the legislature.'

The AG on the Gibraltar case

The AG then considered whether there was a 'strict link' between citizenship of the Union and the scope of the electorate for the European Parliament, as argued by the Spanish Government, as the basis for contesting the extension of the suffrage to Commonwealth citizens in Gibraltar. The AG concluded that the reference to 'peoples' of the member states in Articles 189 and 190 should be treated as largely coterminous with the citizens or nationals of the member states (thus avoiding alternative 'ethnic' rather than 'civic' connotations of the term 'peoples'), but that the people/citizens, so defined, and the electorate for the European Parlia-

⁴² *Ibid.*, para. 67.

⁴³ *Ibid.*, para. 68.

⁴⁴ Art. 6(1) EU provides that 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

⁴⁵ Opinion, para. 69. In the ECHR case-law *see*, for example, *Hirst v. United Kingdom (No. 2)*, Appl. No. 74025/01, judgment of 5 Oct. 2005, at para. 60.

⁴⁶ Opinion, para. 69.

ment should not be treated as automatically coextensive. He based that approach on the fact that member states can and do place restrictions on the right to vote, even for citizens (e.g., age or competence criteria), and that – albeit less often – they can also deploy a more generous approach to the suffrage, including certain categories of non-nationals within it. This is the case in the United Kingdom with Commonwealth citizens. Interestingly, the AG also referred to the fact that EU law does not itself treat the rights it ascribes citizens of the Union as exclusive, citing Articles 194 and 195 EC as examples of rights (to complain to the Ombudsman or to petition the European Parliament) which are ascribed also to natural and legal persons resident in the member states,⁴⁷ and he noted that it would be paradoxical if the member states were to remain the ultimate gatekeepers of the personal scope of Union citizenship, by virtue of the link between Union citizenship and nationality of a member state in Article 17 EC, whilst not at the same time being free to ascribe at least some of those rights of Union citizenship to non-nationals.⁴⁸ In other words, it would be odd if the member states were in an all-or-nothing situation where they could extend all the rights of Union citizenship to a person by allowing them to acquire national citizenship, but they could not, acting autonomously, ascribe a subgroup of those rights to non-citizens.

Rejecting the Spanish argument, the AG denied that allowing the extension of Union citizenship rights to non-nationals of the member states would “dismember” the unicity of the concept of citizenship’.⁴⁹ He also appeared (albeit implicitly) to refer approvingly to the general principle of alien suffrage by commenting positively upon how the principle of universal suffrage seems to demand voting rights for the largest possible number of persons including ‘possibly also for foreigners established in a particular State, who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities.’⁵⁰ The AG also accepted pragmatically that in the absence of a uniform electoral procedure there was indeed no consistency among the member states as to the rules which govern the entitlement to vote for the European Parliament.⁵¹

It might have been expected, given the conclusions he reached, that the AG would find in favour of the UK’s extension of the franchise to allow Commonwealth Citizens resident in Gibraltar to vote in European Parliament elections, even though that group of persons *cannot* vote in legislative elections for the Gibraltar Assembly.⁵² However, the AG insisted that there are limitations upon

⁴⁷ Ibid., para. 91.

⁴⁸ Ibid., para. 82.

⁴⁹ Ibid., para. 92.

⁵⁰ Ibid., para. 93.

⁵¹ Ibid., para. 100.

⁵² Government of Gibraltar, House of Assembly Ordinance, 1950-19, s.3, available from <www.gibraltarlaws.gov.gi>.

the freedom of the member states to determine the scope of the right to vote for the European Parliament, in particular because such elections are not one-off affairs affecting only one member state, but rather are matters which affect all the member states.⁵³ Consequently, he stressed that the power may be exercised 'only exceptionally' and 'within limits and under conditions which are compatible with Community law.'⁵⁴ He cited an example of extensions to persons who had no actual link with the Community (which cannot surely cover the Commonwealth citizens in Gibraltar, who are affected in the same way as other residents by EU legislation) which would not be permissible, and also referred to the principles of reasonableness, proportionality and non-discrimination as governing the compliance of the national rules with EU law. In that sense, the AG saw the situation quite differently to the United Kingdom which referred, in its declaration on this matter, to the extension of the right to vote to Gibraltar 'on the same terms' as the electorate of an existing UK constituency.⁵⁵

The reference to compatibility with EU law guided the AG to a consideration of the specifics of Annex II of the Act on Direct Elections. This is a text which, as noted above, originally excluded Gibraltar from the scope of European Parliament elections and a text which remains, to this day, unamended. It was in relation to compliance with Annex II that he found support for the Spanish case, for in effect all of the measures adopted by the United Kingdom to give Gibraltarians the vote were adopted in breach of the formal text of Annex II. First of all, the AG rejected the contentions of the Spanish Government that when implementing the *Matthews* judgment by facilitating the participation of Gibraltarians in the European Parliament elections, the UK should not have included Gibraltar in another UK-based constituency, provided for the establishment of the necessary electoral register, made it possible physically to vote in the dominion, or allowed for legal proceedings to be possible in Gibraltar to contest the elections should an irregularity have occurred.⁵⁶ It was right and proper for it to do all these things. However, as the United Kingdom was adopting the relevant unilateral measures essentially in order to comply with a fundamental rights imperative as established in the *Matthews* case, he concluded that it should not take any measures in relation to Gibraltar which did not necessarily follow from this mandate or imperative. He argued that the

⁵³ Opinion, para. 102.

⁵⁴ *Ibid.*, para. 103.

⁵⁵ See *supra* n. 35.

⁵⁶ Opinion, para. 125-126.

extension [of the franchise to Commonwealth citizens] does not stem from the need to ensure the exercise of a fundamental right and ... therefore a derogation from Annex II is not justified.⁵⁷

On this point, therefore, the AG suggested that the Court should find in favour of Spain. He made that finding notwithstanding having concluded that there was nothing in the general principles concerned with citizenship and democracy embodied in Articles 17, 19, 189 and 190 EC which precluded the United Kingdom adopting the measures that it chose to adopt. Interestingly enough, the AG appeared to find a pathway through the relevant legal provisions allowing him to conclude that while it was permissible for the United Kingdom to give Commonwealth Citizens the right to vote in European Parliament elections in 'mainland' United Kingdom (and indeed Spain had not sought to argue this), it was in breach of its EU obligations in so doing in Gibraltar.

The AG on the Aruba case

The AG's coverage of the issues in the *Aruba* case is somewhat briefer, and draws upon the general principles articulated in the first part of the Opinion about the nature of the right to vote in European Parliament elections under EU law, the role of member states in this respect, and the scope of limitations and restrictions which they may impose. In this case, the case concerned limitations on the right to vote of Union citizens in European Parliament elections, specifically a limitation imposed upon Netherlands nationals resident in Aruba. Arubans share a single national citizenship with all other Netherlands nationals (whether resident in the Netherlands or in third countries), but they are denied the right to vote in either 'domestic' Dutch or European Parliament elections. The AG concluded that while normally speaking a member state may withhold the right to vote in European Parliament elections from certain groups of citizens, where this can be objectively justified, here there was no objective justification for the distinction drawn. The relevant distinction was not between Netherlands nationals resident in the Netherlands and those resident in Aruba, but rather between Netherlands nationals resident in Aruba and those, previously resident in Aruba, who had moved to another member state or indeed a third state, without having previously established a connection with the Netherlands (i.e., the European part of the state) itself. The latter group are given, on *leaving* Aruba, the right to vote in national and European Parliament elections under Netherlands law, an outcome which the AG saw as 'not comprehensible'.⁵⁸ It undermines completely the basis for arguing

⁵⁷ Ibid., para. 128.

⁵⁸ Ibid., para. 167.

that Arubans, although Netherlands nationals and therefore EU citizens, are denied the right to vote in European Parliament elections on the grounds that they lack a relevant connection with the EU. It should be noted that Aruba has a different status in relation to the EU and the EU Treaties from that ascribed to Gibraltar, and is not directly affected by EU legislation in the same way as Gibraltar. Thus in relation to Aruba, the European Parliament could not be described as a legislature, within the meaning of Article 3 of Protocol 1 of the ECHR, which was the basis for the reasoning in the *Matthews* case and thus the starting point for the entire saga underpinning the *Gibraltar* case.

While the AG's Opinion is a productive source of provocation about the future of European citizenship, it ultimately leaves unresolved the tension between internal inclusivity and external exclusivity which invades all concepts of citizenship, so long as the bounded nature of citizenship is treated as its central facet. He seems instinctively to want to develop the exclusive aspects of European citizenship, not least because he saw this as fostering closer European integration, and his conclusions in the *Gibraltar* case seem to indicate a preference for European Parliament elections to be elections by 'European' citizens unless the member states can demonstrate very good reasons why non-Europeans should be involved. On the other hand, there are several points in the Opinion where the AG appears simultaneously to recognise the attractiveness of an argument which opens out electoral rights to non-nationals on the basis of a principle of affectedness. He notes that

the democratic principle of universal suffrage upon which the European Union is based...militates...in favour of recognising voting rights for the largest possible number of persons, and there possibly also for foreigners established in a particular State, who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities.⁵⁹

If it is applied, of course, the principle of affectedness can challenge the bounded conception of citizenship.

The Court on the Gibraltar case

In the *Gibraltar* case, the Court opted for a narrower approach than the AG to the texts and arguments placed before it. It noted from the beginning that Spain was looking for some means of establishing 'a link between citizenship of the Union and the right to vote and to stand as a candidate for the European Parliament, the consequence of that link being that only citizens of the Union can have that right.'⁶⁰

⁵⁹ Ibid., para. 93.

⁶⁰ Case C-145/04, para. 59.

However, contrary to the contentions of Spain, it confirmed that Article 19(2) is 'confined to applying the principle of non-discrimination on grounds of nationality'⁶¹ to the exercise of the right to vote for the European Parliament. Nor did it find anything in either Article 190 EC or the 1976 Act on Direct Elections defining 'expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament.'⁶² It could derive no clear conclusion that there was a clear link between citizenship of the Union and the right to vote in European Parliament elections in Articles 189 or 190 EC or in the provisions on citizenship of the Union. It repeated its favoured phrase from *Grzelczyk*,⁶³ whereby citizenship of the Union is 'destined to be the fundamental status' of nationals of the member states, but then went on to state that this statement 'does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.'⁶⁴ Thus to a greater extent than the AG, the Court appears to opt for an open and outward-looking concept of citizenship for the EU, under which citizenship rights may be constitutive of the status of the nationals of member states, but the rights themselves are not necessarily confined to citizens alone. However, a warning note should also be sounded for those who seek to derive a stronger concept of Union citizenship from these words, for later in the judgment the Court noted the highly segmented nature of European Parliamentary elections. Because of the way in which the elections are currently organised,

an extension by a Member State of the right to vote at those elections to persons other than its own nationals or other than citizens of the Union resident in its territory affects only the choice of the representatives elected in that Member State, and has no effect either on the choice or on the representatives elected in the other Member States.⁶⁵

This contrasts quite sharply with the approach on this issue taken by the AG, who stressed the *European* nature of European Parliament elections.

In conclusion, the Court confirmed that it was 'within the competence of each Member State in compliance with Community law' to define the persons entitled to vote and stand in European Parliament elections, a conclusion which it bolstered also by a reference to the 'constitutional traditions' of the United Kingdom in this matter, which include the extension of rights to vote in all UK elections to

⁶¹ Ibid., para. 66.

⁶² Ibid., para. 70.

⁶³ Case C-184/99 *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)*, [2001] ECR I-6193.

⁶⁴ Case C-145/04, para. 74.

⁶⁵ Ibid., para. 77.

Commonwealth citizens.⁶⁶ It should be noted that the AG himself did not find any problems in the general context of EU law with the principle of member states extending the right to vote to non-EU citizens, so on this matter the AG and the Court are broadly at one. However, unlike the AG, the Court found no impediment in the detailed text of the Act on Direct Elections and the commitments made by the United Kingdom to organise European Parliament elections including the territory of Gibraltar, consequent upon the judgment of the Court of Human Rights in the *Matthews* case. Rather, given the imperative upon the United Kingdom, the Court concluded that in applying its legislation to the specific case of Gibraltar, the United Kingdom

cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom.⁶⁷

This includes, of course, the definition of the franchise, which is the same in Gibraltar as it is for the rest of the United Kingdom. It is worth noting that even in its newest version, which moves some way towards a uniform electoral procedure by at least requiring the representatives to be elected on the basis of proportional representation, Article 8 of the Act on Direct Elections continues to provide that 'subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions', and the first recital in the preamble to the 2002 amendments provides that member states remain free 'to apply their national provisions', subject to the limited restrictions in the Act.

The Court on the Aruba case

The *Aruba* case concerned not the extension of the right to vote beyond the scope of Union citizenship, but rather its restriction, in this case on the basis of the place of residence of the citizens in question. It is significant that the Court does expressly confirm that as nationals of one of the member states (sharing Netherlands nationality with those resident in the Netherlands) 'citizens' of Aruba are indeed citizens of the Union. It seems to limit its conclusion to those who 'reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC',⁶⁸ but it would seem equally logical to argue that citizenship of the Union is a personal status of nationals of the member states which they carry with them wherever they are. How else, logically, could the principle of consular and diplomatic protection

⁶⁶ Ibid., paras. 78 and 79.

⁶⁷ Ibid., para. 95.

⁶⁸ Case C-300/04, para. 29.

for Union citizens while in third countries enacted in Article 20 EC actually apply? It should surely not be limited only to those who are temporarily in third countries, but must also extend to those with settled residence in third countries.⁶⁹

However, the Court also confirmed that as the Treaty contains no rules expressly stating who are to be entitled to vote and stand as a candidate for the European Parliament, it remains a matter, in the current state of Community law, for the competence of the member states.⁷⁰ There is no unconditional right on the part of nationals of the member states to vote for the European Parliament. In particular, the member states may choose the criterion of residence to determine who votes. In this context, it cited case-law of the Court of Human Rights concluding that 'the obligation to reside within national territory to be able to vote is a requirement which is not, in itself, unreasonable or arbitrary.'⁷¹ However, the exercise of national competence must occur in compliance with Community law. This led the Court to consider whether an OCT was in the same situation, with regard to Community law, as Gibraltar. It concluded that, unlike the case of Gibraltar, the European Parliament cannot be regarded as a legislature with regard to the OCTs. Hence the *Matthews* doctrine at issue in *Gibraltar* case does not apply. Moreover, Article 19(2) and Directive 93/109 are of no assistance to the applicants in this case, as they concern only the application of the principle of non-discrimination on grounds of nationality.

Where the Court does support the applicants is, as with the AG, in relation to the application of the equal treatment principle as between different groups of Netherlands nationals. It confirmed that the principle of equal treatment or non-discrimination is a general principle of Community law,⁷² and concluded that 'the relevant comparison is between a Netherlands national resident in the Netherlands Antilles or Aruba and one residing in a non-member country.'⁷³ As the general principle of equal treatment includes the duty not to treat differently those who are in like situations, and since the two groups identified have in common that they are not resident in the Netherlands, there is a *prima facie* case that they should be treated alike. In fact, the latter group can vote in European Parliament elections (on the argument that this helps to maintain their connection to the Netherlands), whereas the former cannot. However, this 'connection' rationale breaks down when it becomes apparent that Netherlands nationals resident

⁶⁹ See F. Geyer, *The External Dimension of EU Citizenship: Arguing for Effective Protection of Citizens Abroad*, CEPS Policy Brief, No. 134, July 2007.

⁷⁰ Case C-300/04, para. 45.

⁷¹ *Ibid.*, para. 54, citing *Melnychenko v. Ukraine*, Appl. No. 17707/02, para. 56, 18 Oct. 2004.

⁷² Case C-300/04, para. 57.

⁷³ *Ibid.*, para. 58.

in Aruba *gain* the right to vote if they leave Aruba for a third country, since they are then covered by the same *general* Netherlands external voting legislation. The Court concluded that the Netherlands was under an obligation to provide an objective justification for its difference in treatment, and that given this irrationality in the legislative scheme, it had failed to do so.⁷⁴

The final section of the case is concerned with guidance to the national court on the question of redress. What was to be done about the fact that the applicants (along with their fellow Arubans) had been wrongly excluded from participating in the 2004 European Parliament elections? In accordance with its normal principles of remedies, the Court held that in the absence of relevant EU legislation, this is a matter for the national court, subject to the usual caveats that rules governing redress must be no less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the EU legal order (principle of effectiveness).⁷⁵ However, the Court also made it clear that it was not excluded that state liability for the loss caused by the infringement of EU law could be included in the package of remedies made available, but the Court expressed no view about the various options such as re-running the elections or appointing special representatives to advise the Dutch MEPs on behalf of the excluded Aruban electorate which were put forward by the parties. In the event, when the case was remitted to it for final decision, the referring *Raad van State* concluded that the relevant provisions of the electoral law had to be set aside and the municipal authorities' decision to refuse registration had to be annulled. However, the further issues of redress could not be finally disposed of by the *Raad van State*. It indicated that the failure identified by the Court of Justice could be addressed *either* by extending electoral rights to Arubans, *or* by removing external voting rights and applying a narrower residence principal to the right to vote. This is a political choice, which the Dutch legislature must make before the next elections in 2009.⁷⁶

IMPLICATIONS OF THE JUDGMENTS

It is apparent from both the earlier historical review and the subsequent detailed analysis of the *Gibraltar* and *Aruba* cases that the political representation of European citizens has come a very long way since the inception of the European Communities. We have moved from the sole site of contestation of these rights being within and across the European political institutions and the member states to a

⁷⁴ Ibid., para. 60.

⁷⁵ Ibid., para. 67.

⁷⁶ Judgment of 21 Nov. 2006; personal communication Monica Claes, 22 Nov. 2006.

situation where courts are likely to be increasingly involved in deliberating about the scope and nature of those rights. But, as noted at the outset, the two cases under review were driven by particular sets of political circumstances which do not directly relate to European integration, or the question of political representation within the EU as such. Thus it was the ongoing sovereignty dispute between the United Kingdom and Spain over Gibraltar and the continuing negotiations about the status of Aruba and the Antilles within the Kingdom of the Netherlands which provided the opportunity structures within which the cases could come before the Court of Justice. At one level, the cases have quite narrow *rationes*. In *Gibraltar* this concerned how a member state resolved tensions between a human rights imperative resulting from a case before the Court of Human Rights, its constitutional traditions on electoral rights, the restrictive provisions of the Act on Direct Elections in relation to the territorial scope, and its freedom of manoeuvre in relation to the organisation of direct elections. *Aruba* seems a relatively straightforward application of the equal treatment principle, which binds the member states when they are acting within the scope of Community law; clearly they are when organising European Parliament elections, notwithstanding their freedom of action under the Act on Direct Elections. These are not, as such, citizenship cases, or cases directly addressing the scope and nature of political representation in the EU. Neither of the two cases addressed directly the meaning of the electoral rights granted to EU citizens by Article 19, although indirectly they have confirmed that these provisions are indeed equal treatment rules.

While *Gibraltar* is probably the more immediately politically sensitive of the two cases, that does not of itself make this the more significant one. It is, of course, important to note that the Court explicitly recognises the electoral particularities of one member state as being a 'constitutional tradition' which deserves respect, and it should also be noted that the Court projects a broadly inclusive notion of the electoral franchise for the European Parliament, throughout its judgment. On the other hand, it is arguable that the *Aruba* may be the more significant of the two cases. From this case, it can be argued that the combination of the organisation of European-wide elections to the European Parliament, albeit thus far on a segmented national basis, with the creation of a Europe-wide personal status of 'citizen of the Union' can result in quite substantial intrusions into the national electoral sovereignty of the member states.

What is notable is the willingness of both the Court of Justice and the AG to extend the protection of the general principles of Community law to a group of citizens of the Union on a personal basis, notwithstanding that they are not 'connected' in any way to the EU as single market or to the European Parliament as a legislature. Nor indeed are they even residing in another member state, which has been the usual trigger in earlier citizenship cases. This is the true innovation of the

case, and is in many respects far more significant for citizenship as a whole than it is for the narrower question of the right to vote for the European Parliament. The equal treatment principle from which the Arubans benefit is not the general principle of non-discrimination on grounds of nationality which has pervaded the vast majority of the cases hitherto on EU citizenship since as *Martínez Sala*,⁷⁷ nor the right of free movement and the right of residence, at issue in cases such as *Baumbast*⁷⁸ and *Morgan*,⁷⁹ but rather a general principle of equal treatment which protects persons from irrational and unjust legislative outcomes, without reference to some physical or social characteristic which they may have (like gender, age or nationality). It is hard to see how the Court could reach that conclusion if it did not have in its mind, notwithstanding its failure to state this explicitly as the AG chose to, that the right to vote in European Parliament elections is indeed an important incident, or right, of Union citizens.


It would seem that the Court has concluded, while upholding the clear statement in Article 1(2) of Directive 93/109 that 'nothing in the *Directive* shall affect each Member State's provisions concerning the right to vote or stand as a candidate of its nationals who reside *outside its electoral territory*' (emphasis added), that in fact *other provisions* of EU law *may indeed* constrain such provisions. In this case, it is the general principle of non-discrimination or equal treatment. It could in future be other facets of EU citizenship, such as the right of residence, or arguments focused on the exercise of the right of free movement, which is now often the frame within which the Court of Justice is approaching citizenship cases. Clearly the EU, at its present state of integration, lies some way away from a situation in which there could be a harmonisation of national rules on external voting, but a challenge to general exclusionary external voting rules (e.g., in Ireland) or limited external voting rights (e.g., in the United Kingdom where they are limited to fifteen years) could be regarded as a logical next step of the holding in the *Aruba* case. But this may not be in relation to European Parliamentary elections, absent another situation arising such as that in *Aruba*, but rather in relation to voting in national elections. EU citizens resident in other member states, who find themselves unable to vote in any *national* elections as a result of the combination of restrictive naturalisation rules, restrictive external voting rules, and non-existent rights to vote as EU citizens in such elections, may find fruitful lines of argument which they can develop on the basis of *Aruba* in combination with the recent citizenship case-law on freedom of movement such as *Morgan*.

⁷⁷ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

⁷⁸ Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

⁷⁹ See Cases C-11 and 12/06 *Morgan v. Bezirksregierung Köln, Bucher v. Landrat des Kreises Düren*, 23 Oct. 2007.

Returning to the Article 19 electoral rights (local and European Parliamentary), it is conceivable that *Aruba* could give a green light to challenges to the effects of some national rules which apparently restrict the *exercise* of the rights, but which in practice imperil their very *existence*. A challenge could be envisaged to the derogation given to Luxembourg in the European Parliament and local elections directives, allowing the imposition of lengthy qualifying residence periods for EU citizens seeking to vote or stand in those elections where certain thresholds relating to the numbers of resident non-national EU citizens of voting age have been passed. This is notwithstanding the fact that such whole state derogations are explicitly provided for in Article 19. At the very least, the Court may be asked to assess whether the solution chosen in the two directives is proportionate and appropriate to the specific situation of Luxembourg as a member state with a very small overall population and a high population of non-national EU citizens. Such an approach should also draw on the distinction made in citizenship cases such as *Baumbast* between the *existence* of the basic free movement right in Article 18 EC, which is directly effective, and the conditions which member states may place upon its *exercise*, which must be proportionate.⁸⁰



⁸⁰ See M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *European Law Review* (2006), p. 613.